IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ESTATE DUTY REFERENCE No 1 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CONTROLLER OF ESTATE DUTY

Versus

HEMKUNVERBEN KALYANJI A P OF LATE KALYANJI BACHUMAL

Appearance:

1. ESTATE DUTY REFERENCE No. 1 of 1993
MR PRANAV G DESAI for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA
Date of decision: 04/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question of law has been referred for our opinion :-

"Whether, the Appellate Tribunal is right in law and on facts in holding that the reopening was not justified in the present case since the High Court decision relied on by the Assistant Controller of Estate Duty while issuing reopening notice, was not of a jurisdictional High Court and not binding to him ?"

2. Upon the death of Kalyanji Bachulal, his wife Smt Hemkunverben Kalyanji offered for estate duty one half share of the deceased in the HUF consisting of the deceased and his wife i.e. the accountable person. The Assistant Controller of Estate Duty in his original assessment dated 15.10.1977 held that half the estate passed on the death of Kalyanji. Thereafter, the Assistant Controller of Estate Duty issued notice dated 14.9.1978 for reopening the assessment on the ground that the deceased was the sole surviving co-parcener and, therefore, had the power to dispose of the property as if it was his separate property and that the wife could not have objected to such alienation during the life time of the sole surviving co-parcener. The Appellate Controller of Estate Duty upheld that action of reopening and on merits he upheld the order of the Assistant Controller of Estate Duty relying on the decision of the ITAT, Delhi in Bajranglal Saboo, 14 ITD 368. In appeal, however, the ITAT held that whatever may be the merits of the case regarding right of co-parcener to deal with the property, reopening was not justified because there was no binding decision of the Gujarat High Court and, therefore, reopening of assessment was not permissible on the basis of the decision of a Court or a Tribunal in another State. Hence, this reference at the instance of the revenue.

3. We have heard Mr Pranav G Desai, learned standing counsel for the revenue. Though served, none appears for the respondent-accountable person.

4. Mr Desai has vehemently submitted that the real controversy is whether reopening of the assessment was justified and not whether reopening was not justified because the jurisdiction of another High Court or Tribunal was overlooked, which was only one of the arguments.

5. In view of the above submission, we have reframed the question as under :-

"Whether the Appellate Tribunal is right in law and on facts in holding that the reopening was

not justified in the present case ?"

6. Mr Desai has further submitted that since the deceased was the sole surviving co-parcener and he had the full disposing capacity, the Assistant Controller of Estate Duty was justified in reopening the assessment as the entire property in the HUF passed on the death of the deceased to his widow.

Mr Desai has been fair enough to invite our attention to the decision of the Apex Court in Smt Nita Taneja vs. Assistant Controller of Estate Duty, (1995) 211 ITR 462.

7. It appears to us that the facts in the case before the Apex Court were very much similar to the facts in the present case except that in the case before the Supreme Court the power of rectification was invoked and not the power of reopening the assessment as such. The Court dealt with the case both on the question of justification for invoking the power of rectification and also on merits in the following terms :-

"... ... we are of the opinion, having regard to all the facts and circumstances of the case, that it would be appropriate if we dealt with the said question on the merits. We have taken into consideration the meagre amount of tax involved, the fact that the matter relates to the estate of a person who died in 1970 and the further fact that the Act has since been repealed.

We are not satisfied that this was a case where the power of rectification could have been invoked. According to the school of Hindu law governing the parties herein, the appellant was entitled to a share if a partition had taken place during the lifetime of the deceased. Whether she was entitled to demand a partition, we are not sure. In such a situation, if the order of assessment accepted that she had half a share and that only the deceased's half interest passed on his death, it cannot be said that the order suffers from an error apparent from the record which is amenable to rectification under section 61 of the Estate Duty Act. At best, it was a debatable question. On this ground alone and without expressing any opinion on the facts of the case, we allow this appeal and set aside the order of the Assistant Controller dated September 8, 1977."

8. In our view, the facts in the present case are similar. The reference relates to the estate of a person who died in the year 1972. The Estate Duty Act has since been abolished. Apart from these features, we are also of the view that even if the accountable person i.e. the wife may not have any right to demand partition of HUF property, if the partition had taken place during life time of the deceased, the wife would have been entitled to a share in the HUF property. The provisions of Section 8 of the Hindu Succession Act also provide that where a male member of a Hindu Undivided Family dies, a notional partition takes place just before his death and, therefore, the wife of the deceased would notionally get her share in the HUF property. Since the original order of assessment accordingly accepted that the wife had half a share and that only the deceased's half share passed on his death, it cannot be said that the case called for any reassessment.

In above view of the matter, we are of the view that the question, whether reassessment was justified on the ground of overlooking the decision of another High Court or Tribunal, is not required to be considered.

9. We accordingly answer the question as reframed by us in the affirmative i.e in favour of the accountable person and against the revenue.

The reference accordingly stands disposed of.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

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